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No. 89-1330

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' BRIEF

W. MICHEL PIERSON *
A. ELIZABETH GRIFFITH
PIERSON, PIERSON & NOLAN
Suite 1600
217 East Redwood Street
Baltimore, Maryland 21202
(301) 727-7733
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Court of Appeals decision, which precludes consideration of the union's rule regulating distribution of union campaign literature in the determination of whether Brown's non-complying request to distribute literature was reasonable under section 401(c) of the Labor-Management Reporting and Disclosure Act, is erroneous in light of the statute's goals and legislative history.

LIST OF PARTIES

The parties are listed in the caption.

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PETITIONERS' BRIEF

OPINIONS BELOW

The opinions of the panel of the Fourth Circuit which initially decided the case on September 14, 1988 are reported at 857 F.2d 216 and are included in the Joint Appendix at page 79. The opinions entered on rehearing en banc are reported at 889 F.2d 58 and are included in the Joint Appendix at page 89. The opinion of the district court is unreported and is included in the Joint Appendix at page 76.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on November 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A Writ of Certiorari was granted June 18, 1990.

STATUTES INVOLVED

Section 401(c), Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(c):

> Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained

> and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

STATEMENT OF THE CASE

The International Organization of Masters, Mates & Pilots is a labor organization of about 8,500 members who are employed in various positions related to the maritime industry. The union comprises several membership groups organized along craft lines. For example, the Offshore Membership Group includes deck officers employed aboard deep sea ships; the Pilots Membership Group is made up of pilots; and the Pacific Maritime Region includes officers on various vessels operating on the Pacific Coast.

The highest governing body of the union is the convention (Joint Appendix 17). Regular conventions are held biennially (Joint Appendix 17). Delegates to the convention are elected by the membership of each group. Between conventions, the organization is governed by a General Executive Board, made up of the international officers and the vice-presidents (Joint Appendix 18-19).

Elections of IOMM&P's officers are held quadrennially and are conducted by mail ballot. (Joint Appendix 26). The International President, International Secretary-Treasurer of the union, the vice presidents who head each membership group, other officials and convention delegates are elected by plurality vote, all of whom serve until the next election. (Joint Appendix 25). Candidates for office must satisfy various eligibility requirements, including membership for a certain length of time, continuous good standing for a specified period and qualifying service (Appendix 27).

The procedure for elections is set forth in Article V of the IOMM&P Constitution. (Joint Appendix 24).

Nominations for offices are made at the regular convention preceding the election. (Joint Appendix 29). Nominations may be made by petition or from the floor at the convention. (Appendix 30). A member, who is a delegate to the convention as was respondent, may nominate himself. (Appendix 59). An International Ballot Committee, which supervises the election, is elected at the convention (Joint Appendix 36), and an impartial balloting agency, which conducts the balloting, is also selected by majority vote of the delegates at the convention. (Joint Appendix 26). Article V, § 9 of the Constitution sets forth the balloting procedure. (Joint Appendix 37). The impartial balloting agency, under the supervision of the International Ballot Committee, (Joint Appendix 37) prepares the official ballot and mails it to all members. (Joint Appendix 38). The ballots must be mailed not sooner than ten days nor later than thirty days after the close of the nominating period. (Joint Appendix 38). In the 1980 and 1984 elections, the ballots were mailed on the 30th day. (Joint Appendix 57). The ballot is closed ninety days after the date that the ballots are mailed by the Impartial Balloting Agency. (Joint Appendix 38).

All candidates who are nominated must accept the nomination in writing within ten days. (Joint Appendix 31). Each officer candidate may submit a statement of fact not exceeding 200 words for inclusion on the ballot. (Joint Appendix 31). The International Ballot Committee meets after the convention to review the candidates' qualifications and certify their eligibility. (Joint Appendix 60).

Article V, section 10a governs distribution of campaign literature. It provides:

> Any candidate desiring to distribute literature in connection with his candidacy, as provided under Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959, shall be required to pay in advance for the cost of such distribution. The amount shall be certified by the independent mailing service as designated by the Impartial Balloting Agency. The Impartial Balloting Agency shall make appropriate arrangements for the security of the mailing list. The Impartial Balloting Agency shall immediately notify the candidates of the name of the mailing service and the cost of distribution of the candidate's literature.

(Joint Appendix 39-40).

When the candidates have been certified as eligible, they are all notified of the procedures for mailing at the same time. (Joint Appendix 39-40). The independent mailing service is designated by the Impartial Balloting Agency. (Joint Appendix 39). Thus, the right to have literature distributed through the union's mailing list only commences after the nomination and certification process is complete. Candidates may make unlimited mailing throughout the balloting period.

On July 11, 1988, Timothy A. Brown filed suit in the United States District Court for the District of Maryland against the IOMM&P, Robert J. Lowen, its International President, and F. Elwood Kyser, its International Secretary-Treasurer. The suit sought an order pursuant to section 401(c) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481 (c), to compel the compliance with his request for distribution of campaign literature. (Joint Appendix 7). With the complaint, Brown filed a motion for a preliminary injunction, with affidavits, expressly seeking all relief that he might obtain by final order. Brown alleged that he intended to be a candidate for the office of International President of the IOMM&P in the election of officers scheduled to commence within thirty days after the Organization's nominating convention on August 22-24, 1988. (Joint Appendix 8).

Brown alleged that he had addressed a request to Kyser on May 9, 1988, to distribute literature prior to

the convention. (Joint Appendix 42). The request was denied on June 7, 1988. (Joint Appendix 44). Brown appealed to the General Executive Board on June 15, 1988, (Joint Appendix 46) and his appeal was denied on July 6, 1988. (Joint Appendix 48).

In an affidavit submitted with his motion, Brown stated the reasons why he desired to make a distribution of literature earlier than the time permitted by the Organization's rule. He stated that he wished members to have his literature to begin consideration of his candidacy at an early date. (Joint Appendix 14). He also stated that he wished to obtain support for his nomination. (Joint Appendix 13).

Although not stated in his papers, Brown was a delegate to the 1988 convention. He had served as a delegate for the preceding 14 years and had campaigned for office in the past. (Joint Appendix 61).

Prior to any action by the District Court, Brown filed a motion for a temporary restraining order, on July 20, 1988, again expressly seeking all relief obtainable by final order. The reason expressed for filing this motion was the fact that process had not been served on defendants. On July 21, 1988, defendants filed a memorandum in opposition to the motion for preliminary injunction, with affidavits.

On July 25, 1988, District Judge J. Frederick Motz heard argument from counsel. (Joint Appendix 64). The court decided that no testimony was necessary and denied the union's request to present evidence. (Joint Appendix 72-73). At the conclusion of the argument, Judge Motz ruled in favor of plaintiff, delivered an oral opinion, and entered an order submitted by plaintiff granting a preliminary injunction compelling the distribution of campaign literature prior to the convention. (Joint Appendix 74). On July 26, 1988, Judge Motz filed a memorandum setting forth additional reasons for his decision. (Joint Appendix 76).

The court ruled that Brown's request was clearly reasonable, and that the appropriate focus was on the request rather than the Organization's rule. It held alternatively that the rule was unreasonable because by excluding preconvention mailing it created an insufficient period for the exchange of ideas among members.

Petitioner appealed to the Fourth Circuit. The district court's order was initially affirmed by a divided three judge panel. Judge Russell, writing for the majority, held that under the language of the statute Brown's rights depended "entirely on whether his request may be said to be reasonable." (Joint Appendix 81). In making this decision, the majority noted that its decision did not consider the reasonableness of union rules. (Joint Appendix 84). Thus, according to the majority, the language of section 401(c) precluded consideration of the request's compliance with the union's rule. The court noted that its conclusion accorded with the view of the Secretary of Labor (Joint Appendix 82). The court stated that it was aware that its view conflicted with that of the Third Circuit, but rejected that Circuit's view. (Joint Appendix 85).

Judge Hall dissented, arguing that the majority's view that "unions are without power to structure their own electoral process even when that process serves the Act's broader purposes of promoting union democracy" was "an irrational result." (Joint Appendix 88). Judge Hall also rejected the deference given to the Secretary's interpretation of section 401(c), stating, "while the views of the administrative agency to which statutory enforcement is entrusted are entitled to some deference, we need not accept those views blindly. In this instance, the Secretary's position is not only contrary to reasonable statutory interpretation, it is also arguably in conflict with his [sic] own regulations." (Joint Appendix 88).

The case was reargued before the court en banc on the union's petition. The en banc court adopted the

majority panel opinion. (Joint Appendix 90). Judge Phillips joined Judge Hall in dissent, stating that "If a union's general rule is not unfair or arbitrary in its general application, then a candidate's request to be exempted from its requirements is obviously 'unreasonable.' If this is not so, then there is little reason for unions to attempt to regulate election procedures by general rules." (Joint Appendix 90).

SUMMARY OF ARGUMENT

In assessing how a union must satisfy its duty to comply with all "reasonable requests" by bona fide candidates for distribution of campaign materials under section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), the legislative goals and history must be considered. A review of the statutory scheme reveals that in enforcing the provisions of the LMRDA, the courts should strive to protect the public interest in free and democratic elections while avoiding undue governmental intrusion into a union's internal affairs. Examination of the union's duties in light of these policies reveals that the regulation of distribution of campaign literature for union office by reasonable nondiscriminatory union rules is permitted by section 401 (c). The contrary argument that the reasonableness of the candidate's request should be determined by examination only of the request itself necessitates standardless ad hoc decision making, and in turn, destroys union self-government and harms union democracy. Moreover, the Secretary's support for this interpretation should not be given deference as it is contrary to legislative dictates and the Department of Labor's regulations as well. Finally, the district court's alternative holding that the union's rule was unreasonable cannot be sustained because it was entered without evidence.

ARGUMENT

I. THE LOWER COURTS ERRED IN HOLDING THAT SECTION 401(c) REQUIRED THE GRANTING OF BROWN'S REQUEST TO DISTRIBUTE CAMPAIGN LITERATURE IN VIOLATION OF THE UNION'S REASONABLE NONDISCRIMINATORY RULE

This case poses the issue of whether the underlying goals of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") in promoting free and democratic elections while preserving union self-government are better served by rule-making by the union majority, rather than through ad hoc decision-making by union officials and the courts. Resolution of this issue lies in the construction of section 401(c) of the LMRDA, which sets minimum standards governing a union's distribution of campaign materials and access to membership lists. In interpreting the statute, this court has consistently avoided a literal reading of the LMRDA and has instead looked to its legislative history and underlying goals to determine what construction will best serve the interests of the union, its members, and the public.

Respondent asserted, and the Court of Appeals agreed, that the interest of the individual candidates must receive undivided focus in order to assure the public interest in democratic elections. Specifically, respondent has argued that only by granting maximum freedom to the candidates in their campaign requests, regardless of how they fit in the context of the union's attempt to govern itself, can democracy be furthered. That view reflects a basic misunderstanding of the nature of democracy, which ultimately undermines not only union self-government, but democracy itself.

In contrast, petitioner advocates an interpretation which protects the individual and public interests by acknowledging the basic standards of union conduct established under section 401, while promoting the long-

standing Congressional policy of avoiding undue intrusion into union self-government. Petitioner does not argue that all union rules regulating literature distribution must be blindly applied regardless of whether they are reasonable. Rather, petitioner does contend that the reasonableness of a candidate's request must be assessed in reference to the union's election procedure and its fit with the union's rules for distribution. Therefore, a reasonable nondiscriminatory rule regulating the union's distribution of campaign materials should be obeyed; conversely, a request that violates such a rule is unreasonable.[1]

Petitioner will show (a) why its interpretation of the statute is proper and supports its argument; (b) why that interpretation advances the Congressional goals of the statute; (c) why the construction of the statute by the Secretary of Labor, heavily relied upon by the majority in the Fourth Circuit, should not be entitled to deference; (d) why the lower court's interpretation defeats those purposes and is inconsistent with the legislative history; and (e) why the union's reasonable rule should have been followed.

A. The Language of the Statute Permits Adoption of a Rule Governing Requests to Distribute Literature

The resolution of the issue must begin with the statutory language of section 401(c), which in part requires the union to distribute campaign materials on behalf of the candidates for office. 29 U.S.C. § 481(c). Section 401 also sets forth other standards relating to the procedure for election of union officers, including: nomination of candidates; notice of elections; adequate election safeguards; voting rights; use of campaign funds; and counting and publication of election results. This section is part of Title IV of the Act, which is specifically concerned with elections. Title IV is one of seven titles of the Act; the other titles also establish minimum standards by which a union can govern its internal affairs.

[1] Finally, while this issue is not squarely before this Court, petitioner also urges that this court find that its rule is reasonable, and that considered in the full context of this case, Brown's request was unreasonable.

Section 401(c) specifically provides that unions:

> "[S]hall be under a duty . . . to comply with all reasonable requests of any candidate to distribute . . . campaign literature in aid of such person's candidacy."

29 U.S.C. § 481(c). In the proceedings below, the Fourth Circuit held that the language of the statute required only that the candidate's request be examined to determine if it is reasonable, and that the statute foreclosed consideration of any applicable union rules because section 401(c) spoke only of the request. In support of this interpretation, the courts concluded that to construe the statute otherwise would permit unions to nullify the statute's command. (Joint Appendix 85).

However, the language of the statute does not justify such a broad reading. Section 401(c) does not require a union to comply with all requests, but merely with reasonable requests. Thus, the statute itself limits the sweep of freedom of expression by providing that not all requests must be honored. The statutory language itself precludes an interpretation that gives no consideration to a scope other than maximum freedom of expression.

As section 401(c) only requires a union to comply with "reasonable" requests, the statute places upon the union the duty to determine what requests are reasonable. There are two ways that a union may discharge this duty—ad hoc determination of the reasonableness of each individual request, or adoption of rules or procedures that define, in advance, equal terms and conditions for the granting of requests. The language of section 401(c) itself does not indicate a preferred method for the determination of a request's reasonableness.

Accordingly, the conclusion of the lower courts that the statute directs the court to consider only the request itself, because the adjective "reasonable" precedes the noun "requests," is not supported by the words of the statute. Because the reasonableness standard in reality requires a device for implementation of that standard, it poses the issue of the proper method of implementation. Thus, the "plain" language of the statute does not compel either interpretation.

Furthermore, a moment's reflection suffices to demonstrate that the reasonableness of a candidate's request cannot be measured without reference to the union's election procedure. How possible would it be for a union or court to determine whether a request is reasonable without knowing something about how it related to the structure of the union and the way the election is conducted. The contention that *only* the candidate's request itself may be considered in determining its reasonableness is self-evidently absurd.

It is therefore apparent that nothing in the statute forbids the union to have a rule governing candidates' requests to distribute literature. It is also apparent that nothing in the statute dictates that a court should disregard such a rule in determining whether a request to distribute literature should be granted. Adoption of a published, majority made rule would more fairly and equally regulate such requests.

Moreover, this Court has consistently viewed with disfavor, the "literal" approach advocated by respondents. As stated in *Wirtz v. Local 153, Glass Blowers*, 389 U.S. 463, 88 S.Ct. 643, 19 L.Ed.2d 705 (1968):

> We have cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve. See, e.g., *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 619, 87 S.Ct. 1250, 1255, 18 L.Ed.2d 357 (1967). *The LMRDA is no exception.*

Glass Blowers, 389 U.S. at 468. See also, *Local #82, Furniture & Piano Movers v. Crowley*, 467 U.S. 533, 541, 104 S.Ct. 2557, 2566, 81 L.Ed.2d 4517 (1984).[2] To determine the proper means for construing section 401(c), therefore, this Court must consider the underlying legislative history and goals of the LMRDA.

B. The Legislative Intent Dictates That a Reasonable Nondiscriminatory Union Rule Be Followed

In support of its interpretation of section 401(c), the Fourth Circuit majority focused entirely upon the Congressional intent to foster union democracy. In fact, its focus was so concentrated that it saw that the only purpose of the statute was to offset the alleged advantages enjoyed by incumbent officers. In its view, assuring the candidate the maximum ability to distribute literature was necessary, regardless of what the established election procedures provided. Implicit in its approach was the corollary that any rule limiting distribution was

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[2] This interpretation is supported in a comment by Archibald Cox, who was involved in promulgation of the LMRDA, which has been cited with approval by this court:

> The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromise essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words.

Glass Blowers, 389 U.S. at 468, n.6, quoting Cox *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*. 58 Mich.L.Rev. 819, 852 (1960).

the creation of the incumbent officers to solidify their grip on their offices.

There is no question that a substantial reason for the enactment of the LMRDA was to safeguard the public and individual union member's interest in union democracy. However, as this Court has noted:

> The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs. The extensive and vigorous debate over Title IV manifested a conflict over the extent to which governmental intervention in this most crucial aspect of internal union affairs was necessary or desirable. In the end there emerged a "general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts."

Glass Blowers, 389 U.S. at 470, 471, quoting *Calhoon v. Harvey*, 379 U.S. 134, 140, 85 S.Ct. 292, 296, 13 L.Ed.2d 190 (1964). *See also, Hodgson v. Local 6700, USWA*, 403 U.S. 333, 91 S.Ct. 1841, 29 L.Ed.2d 510 (1971); *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 102 S.Ct. 2339, 72 L.Ed. 707 (1982); *Local 82, Furniture and Piano Movers v. Crowley*, 467 U.S. 533, 104 S.Ct. 2557, 81 L.Ed.2d 457 (1984).

To achieve these competing goals, Congress created a statutory scheme under the LMRDA wherein the unions are authorized to govern their internal affairs, including elections, subject to the standards prescribed in Title IV. *Wirtz v. Hotel, Motel and Club Employees, Local #6*, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968). Only when the union violates the standards of Title IV, and particularly section 401, is outside enforcement authorized by the Act. *Hotel, Motel Employees*, 391 U.S. at 498. This approach thus serves the interests of the public, union members and unions, and should guide this Court in the proper construction of section 401(c).

A major defect in the construction given the statute by the Fourth Circuit is that it fails to even consider the Congressional policy encouraging union self-government. There can be no question that forbidding the union to have a rule would undermine a union's autonomy. If the union's rule governing distribution of literature is not to be considered in ascertaining whether a section 401(c) request is reasonable, then the union's power to govern its own affairs is removed to that extent.

Apart from this frontal encroachment upon the union's power, the construction favored by the Fourth Circuit majority undermines union self-government in other ways. Reasonable rules also further other union interests. They permit the union officers to perform other tasks besides meeting to sit as an adjudicatory body each time a request is made. They reduce the necessity for judicial examination of the motives for denial of each request and scrutiny of whether there is a basis for the union's determination.

Even more importantly, forbidding the union to create and enforce election rules also undermines union democracy. If the union is required to decide the reasonableness of each request without reference to the union's election procedures, there is no established standard for assessing reasonableness. This increases the danger of arbitrary decision-making. It also increases the danger of judicial second guessing, because if the union may have no single standard for judging requests, the court must undertake a review of the reasons assigned by the union in each case where a request is denied. This approach has clearly been discouraged by this Court. *Sad-*

lowski, 457 U.S. at 117. ("In drafting Titles II through VI, Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible,' quoting S.Rep.No. 1684, 85th Cong., 2d Sess., 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimum standards, 'individual members are fully competent to regulate union affairs.' *Ibid.* Thus, for example, in Title IV, which regulates the conduct of union elections, Congress simply set forth certain minimum standards. So long as unions conform with these standards, they are free 'to run their own elections,' quoting *Wirtz v. Glass Bottle Blowers*, 389 U.S. at 471, 88 S.Ct. at 648.")

Finally, even given the Fourth Circuit's single minded focus upon the benefits to insurgents of early mailings,[3] a reasonable rule is still more effective in protecting the interests of the union member and public than the ad hoc decisions. A system inhibiting the efficacy of rules determined according to majority decision at union conventions (Joint Appendix 23) necessarily gives broader control to the union's General Executive Board in responding to requests under section 401(c). As a result, control of the determination of what requests are "reasonable" would be left largely in the hands of the incumbents, and manipulation by them is surely easier where there is no standard to guide the union's decision. Thus, petitioner's interpretation of section 401 is not only dictated by the Congressional goals and history of the LMRDA, but is also necessary to best protect the goals expressed by respondent and the Fourth Circuit. These results have led the other courts that have considered this

[3] Although the Fourth Circuit relied heavily on its belief that the incumbents have an overwhelming advantage against challengers, this Court has noted these advantages are often overemphasized. *Sadlowski*, 457 U.S. at 114-115.

issue to sustain reasonable rules. Their approach is instructive because they considered the statutory goals.

In *Marshall v. Provision House Workers Union, Local 274*, 623 F.2d 1322 (9th Cir. 1980), the Court of Appeals, finding an absence of legislative or judicial definition of "reasonableness" under section 401(c), looked to where this Court had considered reasonableness elsewhere in section 401. That court found that qualification requirements in section 401(e) were also governed by the standard of reasonableness. The court concluded that this was an apt comparison because "rules governing distribution of campaign materials, like qualifications for candidacy, implicate the fairness of union elections." *Provision House*, 623 F.2d at 1325.[4]

Further, the court focused upon the candidates' compliance with the union's rules governing distribution of literature, and found that the union's denial of the requests was proper as the candidates failed to comply with reasonable union election rules. The court rejected the Secretary of Labor's argument that in that case, the union's denial of requests violated section 401(c), because the rules were applied unreasonably. It found that,

> Making exceptions to the rule, by complying with the challengers' late distribution request could have undercut the purpose of the election rules—to eliminate the potential for discrimination among candidates by establishing a uniform set of standards governing all candidates.

Provision House, 623 F.2d at 1326.

[4] This similar standard should be applied to section 401(c) as both it and section 401(e) empower the union to set procedures regarding the conduct of the elections. The approach advocated by respondent undermines self-government by ignoring the union's rules entirely. *Local #3489, United Steelworkers of America v. Usery*, 429 U.S. 305, 97 S.Ct. 611, 50 L.Ed.2d 502 (1977) clearly contemplates that a union's rule should be enforced as long as it does not unfairly or discriminatorily treat the union candidates. 429 U.S. at 312-313. See also, *Sadlowski*, 457 U.S. at 117, quoted *supra*.

Similarly, in *Donovan v. Metropolitan District Council of Carpenters*, 797 F.2d 140 (3d Cir. 1986), the court found that the appropriate standard for determining reasonableness under section 401(c) was whether the rule itself, rather than the request of the candidate, was "reasonable". There, a candidate challenged a union rule which prohibited mailing of campaign materials before a set date. Rules established in January 1984 for an election to be held in June of that year provided that all candidates, upon proper request, would be eligible for authorized mailing labels for mailing literature after April 15, 1984. Complainant made a request that his campaign literature be mailed prior to the April 15th date; based upon the January 1984 rule, his request was denied. The Secretary filed suit to set aside the election. The union council conceded that it was under a duty to comply with reasonable requests to distribute campaign literature, but objected to the Secretary's standards of reasonableness.

In ascertaining whether the rule violated the union's duties under section 401(c), the Secretary contended that the proper test was whether the candidate's request was reasonable rather than focusing on the reasonableness of the union's rule governing requests to distribute literature. After examining the legislative history of section 401(c), the court held that:

> [A] union may adopt and enforce reasonable, nondiscriminatory rules for the distribution of campaign literature in compliance with section 401(c). Unlike the ad hoc balancing test which the Secretary here would require the union leadership to engage in whenever a request for distribution is made, permitting the imposition of uniform rules avoids even the appearance of disparate treatment. Moreover, by minimizing judicial second-guessing, permitting such rules furthers the Act's policy of "balanc[ing] between the public interest in free and democrtaic union elections on the one hand, and the importance

> of minimizing government encroachment on union autonomy, on the other hand."

Metropolitan District, 797 F.2d at 144, quoting *Brennan v. Local 122, Amalgamated Clothing Workers*, 564 F.2d 657, 660 (3d. Cir. 1977).

For these reasons, the Court of Appeals adopted the union reasoning and concluded that no violation of section 401 had occurred. The court concluded that, "although [the candidate] may have had legitimate reasons for wanting earlier mailings, '[w]e must judge the . . . rule not by the burden it imposes on the individual candidate but by its effects on free and democratic elections'" *Metropolitan District*, 797 F.2d at 144, quoting *United Steelworkers*, 429 U.S. at 310-11 n.6.

As the Third Circuit perceived, the fact that granting a request would benefit a candidate, even an insurgent candidate, is not equivalent to furthering free and democratic elections. Furthering democracy is a more subtle process, and involves considerations other than simply granting maximum freedom of expression to everyone.

The Fourth Circuit's view of section 401(c) as simply serving a referee function in contests between insurgents and incumbents blinded it to those other considerations. The statute governs all requests for access to membership lists. It does not apply only to contests where one candidate is an incumbent. By focusing only on the supposed advantages of incumbency, the majority identified democracy with benefit to nonincumbents to the exclusion of other relevant factors.

These cases establish that in assessing the conduct of unions in elections under the dictates of section 401(c), the courts must look to the rule, not the candidate's request. Thus, these cases clearly show that if the candidate's request conflicts with the union's provisions, it is unreasonable *per se* unless the rule is unfair or discriminatory.

C. The Secretary's Interpretation Is Not Entitled to Deference

In further support of its interpretation of section 401(c), respondent and the Fourth Circuit cited to the Secretary of Labor's position that the union's rule should not be considered in determining whether a request is reasonable. However, there are several reasons why the Secretary's interpretation is not entitled to deference in this case. First, the Secretary's regulations do not support the Secretary's interpretation. Second, this is not an appropriate circumstance in which deference to the Secretary is justified.

The position taken by the Secretary was expressed in a letter from Richard Hunsucker, Director of the Department's Office of Elections, Trusteeships and International Union Audits, to respondent. (Joint Appendix 52). Mr. Hunsucker concluded that a request made one month before the nominating convention "would seem to be reasonable." (Joint Appendix 53-54). Mr. Hunsucker, however, stated that a request made "long before the election," would not be reasonable, although he did not explain how to distinguish the two. (Joint Appendix 53).

A review of the Department of Labor regulations, 29 U.S.C. § 452.00 et seq., reveals no express support for the Secretary's interpretation whatsoever. Section 452.67, upon which Mr. Hunsucker primarily relies, provides only that:

> The Act imposes the duty on the Union and its officers to comply with all reasonable requests of any candidate to distribute his campaign literature to the membership at his expense.

29 C.F.R. § 452.67. The section does no more than repeat the statutory language, and does not define the terms used in either the statute or regulations. There is no

dispute in this case that the statute requires a union to honor reasonable requests. The dispute is over how to determine what is a reasonable request. Mere repetition of the statutory language does not advance that inquiry.

The only standard actually set forth in the regulations is the provision of section 452.69 which forbids a union from denying all requests for distribution of literature. Like section 452.67, this adds no content to the statutory command. Clearly, a rule that denied all requests would be inconsistent with "all reasonable requests." [5]

The remaining portion of section 452.67 supports IOMM&P's contention that it is permitted to adopt and enforce a reasonable rule governing the timing of distribution requests. It states that:

> In order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions.

29 C.F.R. § 452.67.[6] The reference to the imposition of conditions upon the distribution of literature clearly indicates that conditions may be imposed by a union, and that in fact, are encouraged by the Secretary. The goals reflected by this regulation can be best served by established procedures determined at the union convention, which are published and known to all union candidates.

Thus, the regulations do not contain any interpretation which is contrary to that proposed by petitioners. Rather, they tend to support petitioner's construction. As administrative interpretations are instructive only inso-

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[5] Moreover, this regulation is not applicable here as petitioner merely requests the right to govern, by union rule, when requests for distribution are allowable, subject to standard of section 401(c).

[6] Judge Hall noted in his dissent from the Fourth Circuit majority decision that this regulation supported petitioner's interpretation. (Joint Appendix 88).

far as they have "power to persuade," the interpretation is not binding here. *Skidmore v. Swift*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944). See generally 2 Davis, *Administrative Law Treatise* § 7:10 2d ed. 1979). The "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97, 104 S.Ct. 439, 78 L.Ed. 195 (1983).

Because the courts are the final authorities on issues of statutory construction, an agency construction which is inconsistent with the statutory mandate or frustrates the underlying congressional policy must be rejected. *Federal Election Comm. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981); *Securities and Exchange Comm. v. Sloan*, 436 U.S. 103, 117-8, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978).

D. The Facts of This Case Exemplify How the Lower Court's Interpretation Defeats the Statutory Purpose of the LMRDA

As petitioner has shown above, the legislative history, regulations and judicial precedent all indicate that the reasonableness of a request must be determined in light of union rules. An examination of this union's election procedure and the way in which Brown's request conflicts with that procedure reaffirms the appropriateness of this approach.[7]

[7] One of the issues argued by petitioner below was that the District Court erred in failing to consider any factual evidence in determining whether petitioner complied with section 401(c). Although this issue is not squarely before this Court, examination of petitioner's election procedure exemplifies the importance of allowing unions to govern their internal affairs.

The procedure that governs the distribution of campaign literature is set forth in the Masters, Mates & Pilots constitution. (Joint Appendix 16). The constitution was adopted by a majority vote of the union membership after receiving a two-thirds majority pro rata vote of convention delegates. (Joint Appendix 16). Thus, disregard of the union's rule does not simply strike down a rule adopted by incumbent union officers for their benefit, but it also frustrates the will of the entire union. Because of its longstanding and consistent application, all candidates were aware of this procedure in advance, fostering equal treatment of all candidates.

This procedure is an integral part of the nomination and election process, whose contours define the reasons for the existence of various rules. The constitutional structure of the union dictates that the election shall be administered by a committee of rank and file members elected by the delegates, and not just by the incumbent officers. (Joint Appendix 36). The convention delegates select the independent balloting agency and independent mailing service, who fulfill the necessary election functions, thus removing the electoral procedures from the taint of control by the incumbents. (Joint Appendix 26-36). Campaign mailings are not authorized until the majority chooses an appropriate independent agency and the nominees are certified in order to protect the campaign's integrity and restrict the use of the mailing procedure to actual, eligible candidates. (Joint Appendix 60).

These procedures show that the union through majority vote, has created a reasoned and coherent procedure for election of its officers. Unlike the interpretation advocated by respondents and the Fourth Circuit, this election mechanism should be disregarded entirely in assessing whether a request to distribute campaign materials is reasonable under the dictates of section 401(c). The effect of such a ruling would not simply exorcise a single

provision but would tear at the entire fabric of the union constitution.

For example, the rationale would preclude the union from enforcing its eligibility requirements. This Court has found that a union is clearly entitled to enforce all reasonable qualification requirements.[8] *Brock v. International Organization of Masters, Mates & Pilots*, 842 F.2d 70 (4th Cir. 1988). It therefore should be able to restrict literature distribution only to those individuals who have satisfied the eligibility scrutiny.

This exemplifies how if the union's rule is disregarded, there may be no guidelines to determine whether a request is reasonable. Any member who professes that he is a bona fide candidate and that he needs to campaign, would claim a reasonable basis for making a request at any time during the four year period between elections.

The results of such a policy would have an unnecessarily burdensome effect on the union. The union officers would be required to continuously assess requests, taking time from their other important responsibilities. The General Executive Board would have to assemble from around the country to adjudge requests, at great expense to the union. The union officers would have to negotiate independently with each "candidate" to select an agreeable mailing service and to define conditions for its use. These decisions would be effectively removed from control of the union majority, where they properly belong.

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[8] Under the union constitution, Brown was not a candidate at the time he made his request, as the convention had not taken place and he had not complied with the certification requirements. (Joint Appendix 26-31). In the appeal before the Fourth Circuit, respondent relied upon cases such as *Yablonski v. Mine Workers*, 80 L.R.R.M. 2594 (D.D.C. 1971) to establish that a person may be a candidate for purposes of literature distribution before he has been nominated. That case, however, involved a procedure where nomination required petitions from 50 locals. As Brown could nominate himself, this case furnishes no support for the argument that Brown was a candidate in this context.

Although this might seem to be a minor burden for the sake of union democracy, it should be noted that this duty is not limited to candidates for International President. Candidates for the vice presidencies and all delegate positions will also want to exercise their rights under expanded section 401(c). Naturally, those candidates with more resources will be better able to make repeated mailings for the four year period.

As Judge Hall observed in his dissent, "In this case there has been no finding or even persuasive suggestion that IOMMP's election procedures limiting candidate mailings until after the formal nomination process is unfair, discriminatory, or provides any undue advantage to incumbents." (Join Appendix 86).

Despite this statutory conflict, the majority of the Fourth Circuit concluded that the union's entire election procedure is to be disregarded because a theoretical advantage to an "insurgent" may be found by judges. It is this interpretation that stands the statute on its head.

Reduced to its simplest form, respondent's position requires that *all* requests to distribute literature must be granted. Respondent has never articulated a line that may be drawn or a way to determine how a line may be drawn. Obviously, adherence to a rule that has not been shown to be unfair, arbitrary or discriminatory provides that measurement of "reasonable requests" called for by the statute.

E. Because Brown's Request Did Not Comply With the Union's Reasonable Rule, It Should Not Have Been Granted

The District Court also rested its decision on a secondary ground—that even if the statute required examination of the union's election procedures, the union's rule was unreasonable. The status of this holding is not certain. It was not considered by the Fourth Circuit in light of its decision, although respondent sought this conclusion as an alternative basis for its ruling. In any

event, reliance upon this rationale would be unsound because the district court's holding was a factual finding that was made after refusing to permit the union to produce evidence.

Although the primary holding involved only construction of the language of section 401(c), once the court moved on to the alternative holding that the union's rule was unreasonable, it placed itself in the position of adjudicating facts. In that position, it should not have adjudicated facts without permitting petitioner the opportunity to present evidence. To the extent that it precluded evidence, the court's holding should not be upheld based upon a factual finding.

As pointed out above, a construction of the statute that focuses only upon the reasonableness of the candidate's request ...cessarily places the court in the position of *ad hoc* judicial decision making. A finding that the union's rule is unreasonable, without permitting the union to bring forth eveidence about the reason for the rule, the mechanics of the union's procedure and the way its elections are conducted greatly exacerbates the problem. Furthermore, the factual assumptions that have been made by the courts below [9] illustrate that knowledge of the facts is unavoidable. If the case is to be decided on facts, then denial of an opportunity to present those facts is fundamentally unfair.

The reasonableness of the union's rule is shown by the reasons for its existence. Because all candidates are notified at the same time, all have an equal opportunity to make mailings. The identity of nominated candidates cer-

[9] For example, the Fourth Circuit assumed that all incumbents, including the IOMMP's officers, abuse union channels of communication between elections to promote their candidacy. (Joint Appendix 83). It is not appropriate to make this unproven possibility the sole basis for construing the statute as the Fourth Circuit has. Where such abuse has been proven, the LMRDA provides remedies and the courts have not hesitated to enforce them.

tified as eligible permits a determination of who is entitled to make mailings. The independent mailing service has been selected. The rule is an organic rule, fashioned by the dictates of the union's election procedure, not an arbitrary rule without relations to them.

Moreover, the rule permits all candidates to have mailings in the hands of members at or before the time the ballots are mailed. In light of the fact that candidates may make repeated mailings throughout the ninety day ballot period, this point is not of unique importance. But to the extent that a candidate views it as important to have his literature in the hands of members before they receive ballots he has that ability under the IOMMP procedure.

The basis of the District Court's conclusion that the rule was unreasonable was its theory that any rule that limited a nonincumbent candidate's [10] right to make mailings to the post convention period was unreasonable. That theory, however, ignores the fact that the rule is an inextricable part of the election procedure. It links that date for distribution to the time when the machinery for the conduct of the election is put in place; that link is natural because the mechanics necessary for all certified candidates to have an equal opportunity to distribute literature are created. Any rule that was not linked to the election procedure would be arbitrary, no matter how liberal in its allowance of mailings. In essence, the district court's conclusion does not simply hold the union's rule unreasonable; it outlaws the Organization's entire election procedure.

The reasonableness of the union's rule is shown by the reasons for its existence. First, because all candidates are notified at the same time, all have an equal oppor-

[10] Brown has been referred to as an insurgent because he is not an incumbent. To the extent that this usage implies that he is not a candidate known to the IOMM&P membership, it ignores his years of campaigning for office.

tunity. Second, the International Balloting Committee knows who has been nominated and who meets the candidacy requirements. Third, the independent mail service has been selected. It is an organic rule, fashioned by the dictates of the union' election procedure, not an arbitrary rule without relation to them.

We ask that this Court reverse the decision below and find that respondent's request to distribute literature not in conformance with the union's rule was not reasonable within the meaning of section 401(c). In the event the Court determines that the factual record below is not sufficient to compel a reversal, we ask that the case be remanded to the District Court for a full evidentiary hearing to reconsider its conclusion that the rule was unreasonable in the light of facts in evidence rather than assumptions.

CONCLUSION

For the reasons stated, it is respectfully prayed that the District Court and Court of Appeals decisions be reversed, and that this Court find that Petitioner's denial of a noncomplying request to distribute literature was reasonable under 28 U.S.C. § 481(c). Alternatively, it is respectfully prayed that the Fourth Circuit decisions be reversed, and that this case be remanded for proceedings to present evidence on the issue of whether the rule is reasonable.

Respectfully submitted,

W. MICHEL PIERSON *
A. ELIZABETH GRIFFITH
PIERSON, PIERSON & NOLAN
Suite 1600
217 East Redwood Street
Baltimore, Maryland 21202
(301) 727-7733
Counsel for Petitioners

* Counsel of Record